IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ALBERT J. & PATRICIA RIEDINGER,	)	
Appellants,	)	
v.	)	**C.A. No. S10A-01-005 RFS**
BOARD OF ADJUSTMENT OF SUSSEX COUNTY, DOMINIC A. MARRA and LESLIE D. MARRA,	)	
Appellees.	)	

O R D E R

Upon Appellants' Appeal of a Decision of the Sussex County Board of Adjustment. Reversed and Vacated.

Submitted: September 17, 2010
Decided: September 29, 2010

John A. Sergovic, Jr., Esquire, Sergovic & Carmean, P.A., Georgetown, Delaware 19947, Attorney for Appellants.

Richard E. Berl, Jr., Esquire, Smith Feinberg McCarney & Berl, LLP, Georgetown, Delaware, Attorney for Appellees Board of Adjustment of Sussex County.

John E. Tracey, Esquire, Young, Conaway, Stargatt & Taylor, LLP, Wilmington, Delaware 19801, Attorney for Appellees Dominic and Leslie D. Marra.

This is my decision on a Petition to review a decision of the Board of Adjustment of Sussex County ("Board"). The Petition was filed by Albert J. and Patricia Riedinger ("the Riedingers"). Respondents are the Board and also Dominic and Leslie Marra ("the Marras"). At the administrative level, the Board denied the Riedingers' application for an area variance in the front setback of their home at Maryland Avenue, Fenwick Island, Delaware. For the reasons explained below, the Board's decision is reversed and vacated.

Facts. Although the Riedingers' 2009 application is currently under review, a summary of their two prior applications is necessary. In 2003, the Riedingers applied for a variance from the side and front yard setback requirements. They proposed to elevate the living area of their house from the ground level to the second floor to place it above the flood line. They asked for a front yard setback for steps to the ground. They also wanted to move the house 3 feet to take it off the westernmost property line. The Board granted the application on the condition that the house be set in the center of the property so as to leave the neighbors' views unimpeded. However, the Board made no reference to the steps.

After the application was granted, the Riedingers began construction, including a small landing outside the front door to the new second level and a staircase to reach the ground. Construction was halted when the Riedingers were cited for violation of the Zoning Ordinance establishing front yard setback requirements. The steps were removed, but the small landing on the second level remains, supported by two vertical beams. The

front door leading to the landing has a board nailed across it for safety purposes.

In 2006, the Riedingers sought an area variance for the front steps. In its decision following a hearing, the Board noted that steps could be placed in the Riedinger's sizeable garage and that there was access to the house from the side yard. The Board concluded that any hardship or practical difficulty was created by the Riedingers and that there was nothing unique about the lot or any showing that a variance was necessary to make reasonable use of the property. The application was denied.

In 2009, the Riedingers applied for a variance to build a deck across the entire front of the second level of the house. The deck would not have ground level access, that is, no steps.

The Board held its first hearing regarding the deck on October 19, 2009. Testimony was taken from Mr. Riedinger, who gave a history of the construction issues and described the outcomes of the 2003 and 2006 applications. He also explained the current application for a 3.6' variance for the deck. During Mr. Sergovic's examination of Mr. Riedinger, Mr. Berl, Assistant County Attorney, interrupted the questioning, and the following exchange took place:

> MR. BERL: Mr. Sergovic, is this not the same application that was presented before?
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> MR. SERGOVIC: Yeah, but the application presented before was requesting steps from the ground floor to reach the front door [on the

second level]. At this juncture, we're only asking for a deck similar to the decks that [were] approved at [nearby locations.] . . . . And these are all similar decks which do not have steps leading up to the deck that were granted by similar variances.[1]

Later in the hearing, the following statement was made:

MR. SERGOVIC: . . . .And [part] of the rationale for the last rejection was the fact that you could get interior steps inside the garage, but we're not asking for steps, we just want to be able to use the front.[2]

Respondents Dominick and Leslie Marra, next door neighbors, testified in opposition to the variance. Their primary point was that the newer houses on the street were relatively in line with one another across the front yards, and the Marras objected to the proposed deck extending beyond the average front yard setbacks.

The Board received seven letters from neighbors supporting the application and none in opposition. The case was tabled until the Board's next regular meeting.

The second hearing took place on November 2, 2009. No testimony was taken. Mr. Berl gave a summary of the evidence. He then stated that "the last application was for steps along the front, this application is for a deck across."[3] He then suggested that

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[1]Transcript (Oct. 19, 2009) at 9–10.

[2]*Id.* at 12.

[3]Transcript (Nov. 2, 2009) at 4.

the Board should "decide if this was a substantially different application or if it was too much like the [2006] one which means it shouldn't be even considered on the merits."[4] Without discussion and without reference to the depth of either requested variance, the Board found that the two applications were alike and that the merits of the pending application should not be considered. The application was denied. A written decision followed, stating that the two applications were not substantially different and that the Board had no legal standpoint from which to consider the application.

Issues. On appeal, the Riedingers argue first that the Board committed legal error when it found that the 2009 application was barred by the principle of *res judicata*. In the alternative, they argue that the Board's ruling was arbitrary and capricious. Either way, they argue that upon reversal the Court should enter judgment in their favor and grant the variance. The Board argues that it properly declined to consider the merits of the application. The Board also argues that its reasons for the decision are clear from the record. Respondents Dominic and Leslie Marra argue that the Board made no error of law, but that if the Court finds error the case should be remanded to the Board.

Standard of review. On appeal from a decision of the Board of Adjustment under 9 *Del. C.* § 6918, the Court's review is limited to the administrative record.[5] The Court is bound by the Board's findings if they are supported by substantial evidence, but has

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[4] *Id.* at 4.

[5] *Riedinger v. Board of Adjustment of Sussex County*, 2000 WL 33114345 (Del. Super.)(citing *Searles v. Darling*, 83 A.2d 96 (Del. 1951)).

plenary review of questions of law.[6] The Court may "reverse or affirm, wholly or partly, or may modify the decision brought up for review."[7]

Discussion. The Court rejects the Board's assertion that its reasoning in denying the variance is clear from the record. The record reveals inconsistencies and inadequate reasoning on the part of the Board, as explained below. The Board must articulate its reasoning in sufficient detail to provide this Court with a basis for appellate review,[8] which it has not done in this case.

The Riedingers assert that if the decision is reversed they should prevail on the merits. The Marras argue that if the decision is reversed, the case should be remanded to the Board. Although these are different arguments, they fail for the same reason. "A reversal [of a decision of the Board of Adjustment] vacates the decision, and the applicant may re-apply with the proceedings before the Board beginning anew."[9] This Court has no authority to remand nor to make the factual findings urged by the Riendingers.

Thus, the first issue is whether the Board erred in declining to consider the merits of the application because the 2006 and 2009 applications were not substantially

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[6]*Reagan v. Heintz*, 246 A.2d 710 (Del. Super. 1968).

[7]Title 9 *Del. C.* § 6918(f).

[8]*H.P. Layton Partnership v. Board of Adjustment of Sussex County*, 2010 WL 2106817, at *4 (Del. Super.)(citing *Cingular Pennsylvania, LLC v. Sussex County Board of Adjustment*, 2007 WL 1522548, at *4 (Del. Super.)).

[9]*Hellings v. City of Lewes Board of Adjustment*, 1999 WL 624114, at *3 (Del.).

different. The rules regarding the finality of decisions in zoning cases are no different from such rules in other areas of the law.[10] The principles of *res judicata* and collateral estoppel have resulted in the general rule that a board of adjustment has no power to reopen its own decision by vacating, revoking, rescinding or altering it after it has been made.[11] However, a board of adjustment can consider a new application for similar relief is there has been a substantial change in the conditions affecting the property or in the proposed use.[12]

A determination of whether a substantial change in circumstances or in the proposed use or variance exists is a fact question for the Board.[13]

In this case, the Board reached a conclusion on this question but failed to provide reasons based on the evidence. The Board never mentioned the depth of the two proposed variances either at the hearings or in the written decision. Moreover, in the written decision the Board incorrectly stated that the 2006 application was for a deck and steps, thereby creating a non-existent similarity. In fact, the 2006 application requested a front yard variance of 8' for steps only. The 2006 decision denied the variance for the steps. The 2006 records made no mention of a deck.

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[10]*Kollack v. Sussex County Board of Adjustment*, 526 A.2d 569, 572 (1987)(citing 3 A. Rathkopf and D. Rathkopf, *The Law of Zoning and Planning*, § 48.01 (4th ed. 1986)).

[11]*Id.* at § 48.02(1).

[12]*Id.* at § 48.02(2).

[13]*Kollack*, at 572.

In contrast, the 2009 application is for a front yard variance of 3.6' for a deck on the second floor without steps. This is confirmed by the design drawing. The average front yard setback was 21.5', and the Riedinger house is set back 22.8'. The 2006 request was for 8' at ground level, whereas the 2009 request for 3.6' at the second floor level. None of these factors was mentioned by the Board. The conclusory finding that there is no substantial difference between the two applications cannot stand. As a matter of law, the Court finds that the Board erred in declining to consider the merits of the 2009 application.[14]

Having reached this conclusion, the Court also finds that the Board's decision was arbitrary and capricious. The party seeking to overturn the Board's decision bears the burden of showing that the decision was arbitrary and capricious.[15] The Riedingers argue that the Board's decision was arbitrary and capricious in three ways. First, the Board failed to cite to any of the record evidence to support its finding that there was no substantial difference between the 2006 and the 2009 applications. Second, the Board

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[14]The Court observes that the Board is required to apply specific standards when considering an application for an area variance. Title 9 *Del. C.* § 6917(3) sets forth five elements that an applicant must meet in order to obtain an area variance. These requirements include the "exceptional practical difficulty" test. *Clear Channel Outdoor v. Sussex County Board of Adjustment*, 2003 WL 22852147, at *3 (Del. Super.).

The Delaware Supreme Court set forth a four-part analysis to be used in conjunction with the exceptional practicalities test. *Board of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978).

[15]*Kirkwood Motors, Inc. v. Board of Adjustment of New Castle County*, 2000 WL 710085, at *2 (Del. Super.)(citing *McQuail v. Shell Oil Co.*, 183 A.2d 572, 578 (Del.1962)).

made no meaningful or substantive comparisons between the applications. Third, the Board failed to consider the recent changes in the character of the neighborhood resulting from other similar variances having been granted. All three of these assertions are correct.

> An arbitrary and capricious action has been described as one: which is unreasonable or irrational, or that which is unconsidered or which is wilful and not the result of a winnowing or sifting process. It means action taken without consideration of and in disregard of the facts and circumstances of the case. Action is also said to be arbitrary and capricious if it is whimsical or fickle or not done according to reason; that is, it depends upon the will alone.[16]

The Riedingers have met their burden of persuasion. As explained above, the Board did not consider the evidence presented, nor did it sift through the evidence to determine its relevance and weight. Other than the fact that the Riedingers had previously applied for area variances, the Board disregarded the facts and circumstances of the case. The Board acted on an impression rather than on record evidence. In so doing, the Board acted arbitrarily and capriciously.

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[16] *Liborio, L.P. v. Sussex County Planning and Zoning Commission*, 2004 WL 2191052, at *3 (Del. Super.)(quoting *Wildel Realty, Inc. v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. 1970).

For all these reasons, the decision of the Board is **REVERSED** and **VACATED**.[17]

IS SO IT ORDERED.

Richard F. Stokes

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cc: Prothonotary

[17]The Riedingers may file a new application with the Board to request the desired variance. *Hellings v. City of Lewes Board of Adjustment,* 1999 WL 624114, at *3 (Del.).